

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1847-CR

Cir. Ct. No. 2011CF544

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDAL G. ROSENTHAL, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Randal Rosenthal, Jr., appeals a judgment convicting him of first-degree intentional homicide. The trial court prohibited Rosenthal from presenting evidence of third-party culpability because Rosenthal failed to meet the criteria set out in *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12

(Ct. App. 1984). Rosenthal contends the **Denny** rule violates the defendant's due process right by arbitrarily restricting his right to present a defense, and **Denny**, as applied in this case, denied him that right. We affirm the judgment.

¶2 The jury found Rosenthal guilty of killing his mother, Kathleen Remter. Her body was found floating in the Fox River. The cause of death was a gunshot wound to the back of her head. The bullet was never found. Witnesses placed Rosenthal's car at the scene. Rosenthal admitted he was fishing with his mother on the day of her death. A bloodstain on his jeans contained his mother's DNA. Rosenthal was the beneficiary of a \$500,000 accidental death policy on his mother's life. He possessed three handguns at the time of her death. The doctor who performed the autopsy opined that Remter was killed by a bullet that came from a 9mm, .357 or .32 gun. Rosenthal's neighbor testified that Rosenthal showed him a 9mm gun earlier on the day of the shooting. A 9mm Beretta was subsequently found in a ditch. A jail inmate testified Rosenthal told him he shot his mother on the river edge and threw her body in the river, hoping the current would drag her body for a few days to give him an opportunity to plan his story and remove any evidence.

¶3 Rosenthal sought to admit evidence that Remter's boyfriend, Mark Marquardt, was a third party who could have committed the murder. **Denny** identified factors, described as a "legitimate tendency" test, a defendant must establish in order to make a claim of third-party involvement relevant. A defendant must show the third party's motive, opportunity and "some evidence to directly connect the third person to the crime charged which is not remote in time, place or circumstance." *Id.* at 624. Rosenthal contends the **Denny** rule is

unconstitutional because it: (1) requires a higher standard of relevance than would be required by WIS. STAT. § 904.01¹ because it requires a “legitimate tendency” instead of “any tendency” to prove a fact of consequence; (2) the heightened standard is not applied equally to the State’s evidence when it presents “other acts” evidence; (3) it obfuscates the real question before the jury, whether there is a reasonable doubt of the accused’s guilt; and (4) it usurps the jury’s role as fact finder.

¶4 In *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006), the Court noted it was permissible to regulate a defendant’s proffered evidence of third-party culpability when the evidence does not connect the third party to the crime. Citing *Denny*, the Court noted cases from twenty jurisdictions limiting the admissibility of third-party culpability evidence, describing these holdings as “widely accepted.” Furthermore, *Denny* is a published court of appeals case and was adopted by the Wisconsin Supreme Court in *State v. Knapp*, 2003 WI 121, ¶177, 265 Wis. 2d 278, 666 N.W.2d 881. This court has no authority to overrule that precedent. See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶5 Rosenthal contends the *Denny* rule was unconstitutionally applied in this case because he established Marquardt’s motive, opportunity and a direct connection to the crime. We review that issue de novo. *Knapp*, 265 Wis. 2d 278, ¶173. Rosenthal presented weak evidence of motive, consisting of Marquardt’s and Remter’s frequent arguments that Marquardt admitted to police would get physical. However, the proffered evidence did not indicate that any weapon was

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

involved or any threat of death or great bodily harm. The most recent argument occurred three days before the shooting and there was no evidence that the dispute continued or the parties did not reconcile as they had numerous times before.

¶6 Rosenthal's evidence of opportunity for Marquardt to commit the crime is stronger. No witness could corroborate Marquardt's statement that he was sleeping at the time of the shooting. He lived six miles from the site and knew where Remter was fishing that day. However, no evidence placed Marquardt at the scene of the shooting.

¶7 Rosenthal presented no evidence of a direct connection between Marquardt and Remter's death. The evidence Rosenthal cites, the three-day-old argument and Marquardt's proximity to the scene of the shooting, relate to motive and opportunity, not a direct connection. No witness saw Marquardt near the scene. The only evidence that Marquardt had access to a gun involved multiple levels of hearsay and was vague as to timing. There was no forensic evidence associating the wound with the kind of gun to which Marquardt allegedly had access, and no evidence such as blood on Marquardt's clothing to connect him to the crime. Therefore, the proffered evidence does not meet the *Denny* standard because it is mere speculation and does not meet the test for relevancy.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

